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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: **DEC 05 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

*Elizabeth McCormack*

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development services company. It seeks to employ the beneficiary permanently in the United States as a senior programmer analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).<sup>1</sup>

At issue in this case is whether the terms of the labor certification require an advanced degree professional for the requested preference classification; whether the beneficiary is qualified for the position; and whether the petitioner has the ability to pay the proffered wage.

### I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).<sup>2</sup> The priority date of the petition is March 28, 2012.<sup>3</sup>

Part H of the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Master's in Computer Science.
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.7. Alternate field of study: Yes, CIS, Engg., Math, Electr., Management, Business, Technology or related.
- H.8. Alternate combination of education and experience: Yes, Bachelor's degree and five years of experience.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: Yes, 60 months of experience in the position offered or a related position.
- H.14. Specific skills or other requirements: a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a master's degree.

Part J of the labor certification states that the beneficiary possesses a Master of Computer Science from [REDACTED] India, completed in 2001. The record contains a copy of the beneficiary's

<sup>1</sup> Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

<sup>2</sup> See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2).

<sup>3</sup> The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

diploma, Master of Computer Applications from [REDACTED] India, completed in 2001, with a statement of marks for 2001. The record also contains a copy of the beneficiary's diploma, Bachelor of Science in Computer Science from [REDACTED] India, completed in 1998, and a statement of marks for 1998. The record also contains the beneficiary's higher secondary course certificate from [REDACTED] issued in 1995 and the secondary school leaving certificate from the same school issued in 1993.

The record contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] for the [REDACTED] on March 6, 2012. The evaluation states that, based on the number of years and the number of hours of coursework, and the grades obtained, the beneficiary has attained the equivalent of a Master of Science in Computer Science from an accredited United States college or university.

As set forth in the director's March 25, 2013 denial, the primary issue in this case is whether or not the approved labor certification requires a Master's Degree or a Bachelor's degree with five years of progressive experience pursuant to section 203(b)(2) the Act. The AAO identified additional issues in a Notice of Intent to Dismiss (NOID) issued August 1, 2013. The AAO indicated that the beneficiary's degree, Master of Computer Applications, is not the degree required by the labor certification, Master of Computer Science, and that the beneficiary did not have a degree in a related field specified in the Form 9089. Further, the AAO indicated that the petitioner did not have the ability to pay the proffered wage.

In response to the AAO NOID, the petitioner submitted an opinion letter from Dr. [REDACTED] who based on a course by course comparison of the Master of Computer Applications program with a Master of Computer Science program in the United States, concludes that the beneficiary's Master of Computer Applications is equivalent to a Master of Computer Science from an accredited university in the United States. The petitioner further states that the language at part H.14 of the Form 9089, indicating that the petitioner would accept a combination of certificates and degrees constituting the academic equivalent of a master's degree, is subject to more than one interpretation, and that USCIS erred in inferring only one rational meaning for the language. The petitioner discussed the use of the Kellogg language and how it applies to minimum requirements in a labor certification application. With respect to the ability to pay, the petitioner states that its 2012 tax return indicates that it has the ability to pay the beneficiary the proffered wage, and the proffered wages to all the sponsored beneficiaries.

The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.<sup>4</sup> The AAO considers all pertinent evidence in

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<sup>4</sup> See 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

the record, including new evidence properly submitted upon appeal.<sup>5</sup> A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.<sup>6</sup>

## II. LAW AND ANALYSIS

### The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>7</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful

<sup>5</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>6</sup> *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003).

<sup>7</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A).

misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b),

8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

#### **Eligibility for the Classification Sought**

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. See also 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of

letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

Counsel describes the petitioner's response to Part 14 as "*Kellogg* language," which should not disqualify the position for the requested classification. Counsel argues that the regulation at 20 C.F.R. § 656.17(h)(4) compelled the inclusion of this language in the ETA Form 9089 and that U.S. USCIS should construe this language "as a regulatory requirement of the [DOL] relating to technical language in the [Program Electronic Review Management (PERM)] form [which] does not detract from or defeat EB-2 eligibility." In support, counsel includes a copy of the minutes from a liaison meeting on April 12, 2007 between the Nebraska Service Center and the American Immigration Lawyers Association (AILA). Counsel claims that these minutes show that USCIS will interpret *Kellogg* language in ETA Forms 9089 to mean "any combination that is at least equal to or greater than the specific requirements on the form." Counsel concludes, therefore, the inclusion of the phrase "[e]mployer defines 'a foreign educational equivalent,' in No. 9 to include: a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a master's degree" should not be interpreted as reducing the minimum requirements below a bachelor's degree and five years of work experience.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On the ETA Form 9089 at issue in this proceeding, the petitioner specified the following educational training, and experience requirements for the job of senior programmer analyst:

- Either, a master's degree in computer science or CIS, Engg., Math, Electr.,

Management, Business, Technology or related or a "foreign educational equivalent" (Part H, lines 4, 4-B, 6, 7, 7A, 9,).

- Or, a bachelor's degree in one of those fields, or a "foreign educational equivalent," and 5 years of progressive experience as a senior programmer analyst or in a related field (Part H, lines 8, 8-C, 9, 10, 10-A, and 10-B).
- Alternatively, "Employer defines 'a foreign educational equivalent,' in No. 9 to include: a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a master's degree (Part H, box 14).

The plain language in box 14 makes clear that the beneficiary could fulfill the educational requirement for the proffered position without a master's degree, or even a bachelor's degree. "A combination of lesser degrees, diplomas and/or professional certificates" could consist of less than baccalaureate level education, or no academic component at all, as long as a "qualified evaluation service" finds that a combination of a beneficiary's lesser degrees, diplomas and certificates are equivalent to a master's degree in computer science.

When the petitioner allows the beneficiary to have a bachelor's degree (and five years of progressive experience) to qualify as an advanced degree professional, the degree must be a single U.S. bachelor's (or foreign equivalent) degree. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the legacy INS responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990) and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold at least a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."<sup>8</sup> In order to have education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" of a United States baccalaureate degree. See 8 C.F.R. § 204.5(k)(2).

The beneficiary's degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The AAO cannot conclude that the evidence required to demonstrate that a beneficiary is an advanced degree professional is any less than the evidence required to show that the beneficiary is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. See *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3<sup>rd</sup> Cir. 1995) *per APWU v. Potter*, 343 F.3d 619, 626 (2<sup>nd</sup> Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received from a college or university, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30706 (July 5, 1991).<sup>9</sup>

In the instant case, as the petitioner would allow the beneficiary to qualify for the position based on a combination of lesser degrees, diplomas, and professional certificates, as provided in box H.14, the labor certification does not require an advanced degree professional. The petitioner suggests that the Form 9089 at part H.14 makes clear that the certified credentials evaluator must rely solely on the academic credentials of a beneficiary only, and not on a combination of non-academic training

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<sup>8</sup> Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of H-1B nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

<sup>9</sup> Compare 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, diploma, certificate or similar award from a college, university, school or other institution of learning relating to the area of exceptional ability").

certificates or diplomas. Part H.14, however, specifically allows the credentials evaluator to find any combination of degrees and certificates to be the academic equivalent of a master's degree. As such, the credentials evaluator would be able to make the determination of academic equivalency based on a lesser combination of credentials.

Since the ETA Form 9089 does not require a master's degree or a bachelor's degree plus five years of progressive experience to qualify for the job, the AAO agrees with the director that the labor certification application does not support the petitioner's request on the Form I-140 that the beneficiary be classified as an advanced degree professional. Accordingly, the petition cannot be approved.

### **The Minimum Requirements of the Offered Position**

The petitioner must also establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that he offered position requires a master's degree in computer science or CIS, Engg., Math, Electr., Management, Business, Technology or related, or a bachelor's degree in one of those fields, or a "foreign educational equivalent," and 5 years of progressive experience as a senior programmer analyst or in a related occupation.

Upon review, the AAO finds that the beneficiary has a degree of Master of Computer Applications (MCA) from [REDACTED] India, completed in 2001. The petitioner states that the beneficiary's education is the equivalent of a Master of Computer Science, as supported by the expert opinions of Mr. [REDACTED] and Dr. [REDACTED]. Neither evaluation considers that the fields of study of computer science and computer applications are academically distinct. The MCA is a master's degree, but not in computer science, but rather in the application of computers and software.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, [www.aacrao.org](http://www.aacrao.org), AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." <http://www.aacrao.org/About-AACRAO.aspx> (accessed November 29, 2013). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed November 29, 2013). Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a

publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.<sup>10</sup> If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>11</sup>

The EDGE database provides that, "The Master of Computer Applications represents attainment of a level of education comparable to a master's degree in the United States... Comparable to a degree in computer application, not computer science."<sup>12</sup> Thus, the EDGE database clearly states that beneficiary's degree cannot be considered a master's degree in computer science. Based on all of the evidence, the AAO finds that the beneficiary's MCA is not equivalent to a Master of Computer Science in the United States.

Upon further review, the AAO finds that the beneficiary's MCA is equivalent to a master's degree in a field related to CIS, Engg., Math, Electr., Management, Business, or Technology, as allowed by Part. 7 and 7A of the Form ETA 9089. Thus, the beneficiary has the education required by the labor certification and qualifies for the proffered position under the remaining terms of the labor certification. Nevertheless, because the express terms of the labor certification do not require a master's degree or a bachelor's degree from a college or university and five years of experience, the position does not qualify for classification as an advance degree professional.

#### **The Petitioner's Ability to Pay**

The AAO noted in the NOID that the petitioner did not have the ability to pay the proffered wage to the beneficiary of the instant petitioner and its other sponsored workers. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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<sup>10</sup> See *An Author's Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/Libraries/Publications\\_Documents/GUIDE\\_TO\\_CREATING\\_INTERNATIONAL\\_PUBLICATIONS\\_1.sflb.ashx](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx).

<sup>11</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

<sup>12</sup> <http://edge.aacrao.org/country/credential/master-of-computer-applications?cid=single> (EDGE, accessed July 24, 2013)

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on March 28, 2012. The proffered wage as stated on the ETA Form 9089 is \$95,472 per year.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2002 and to currently employ 31 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on August 9, 2012, the beneficiary claimed to have worked for the petitioner since July 15, 2010.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner demonstrated that it paid the beneficiary \$66,000 in 2012, which is less than the proffered wage (deficiency of \$29,472). Thus, the petitioner must demonstrate that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2012.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co.*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See also Taco Especial*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River St. Donuts*, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang*, 719 F. Supp. at 537 (emphasis added).

The petitioner's income tax return for 2012 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2012, as shown in the table below.

- In 2012, the Form 1120S stated net income<sup>13</sup> of \$66,679.

Therefore, for the year 2012, the petitioner did have sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage. However, we notified the petitioner with a Notice of Intent to Deny (NOID) on August 1, 2013, that it needed to provide additional evidence of the ability to pay an additional 34 workers, based on previously filed and approved Forms I-140. In response, the petitioner states through counsel, that the proffered wages of the additional beneficiaries, less the wages paid to the additional beneficiaries is deficient in the amount of -\$315,864. Counsel indicates that the petitioner has the ability to pay this amount in 2012 by utilizing an accrual based accounting method to account for accounts receivable billed but not yet collected for work performed in 2012.<sup>14</sup>

We, however, are not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting method then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting.<sup>15</sup> The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the accountant's adjustments.

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<sup>13</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2012) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed 10/28/2013)

<sup>14</sup> The petitioner's tax returns were prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized when they are paid. See <http://www.irs.gov/publications/p538/ar02.html#d0e1136> (accessed November 15, 2011). We would, in the alternative, have accepted tax returns prepared pursuant to accrual method of accounting, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS).

<sup>15</sup> Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. See <http://www.irs.gov/publications/p538/ar02.html#d0e2874> (accessed November 15, 2011).

Counsel further asserts the petitioner's net income can be added to its net current assets to show the total amount of funds available to pay the wage. It is clear that counsel wants to combine the petitioner's taxable income with the cash also received by the business for that year as part of the Schedule L net current assets. USCIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. Counsel's method would duplicate revenues received by the business during the year.

The petitioner has provided evidence that 18 beneficiaries are currently working and six obtained green cards from 2011 to 2013. USCIS records provide that the petitioner has sponsored a total of 34 workers for immigrant visas. Moreover, another 20 beneficiaries may be currently petitioned for as well. The evidence in the record does not provide the priority date, proffered wage or wages paid to 10 other beneficiaries, whether any of these other petitions have been withdrawn, revoked, or denied, or whether any of the other 10 beneficiaries have obtained lawful permanent residence.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>16</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2012, as shown in the table below.

- In 2012, the Form 1120S stated net current assets (liabilities) of (-\$60,760).

Therefore, for the year 2012, the petitioner did not have sufficient net current assets to pay the proffered wage.

The petitioner also attaches a company balance sheet as of December 31, 2012. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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<sup>16</sup> Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. Current liabilities are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary of the instant petition and its other sponsored workers the proffered wage as of the priority date through an examination of wages paid to the beneficiaries, or its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Sonegawa*, 12 I&N Dec. at 614-15. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to have been in business since 2002 and to employ 31 workers. The petitioner has also paid substantial wages in 2012 to its workers. However, the record does not contain evidence of established historical growth of the petitioner's business, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. The petitioner claims to employ 31 workers, however it has petitioned for over 34 immigrant workers, for whom it must establish an ability to pay the proffered wage from an analysis of its net income or net current assets. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage to all of its beneficiaries.

### III. CONCLUSION

In summary, the petitioner failed to establish that the terms of the labor certification support the immigrant visa classification and that the petitioner has the ability to pay the proffered wage. The director's decision denying the petition is affirmed.

*NON-PRECEDENT DECISION*

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The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.